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In the Supreme Court of the United States.

October Term, 1903.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
JAMES L. CARSON,
Defendant in Error.

No. 546.

Motion to Dismiss or Affirm and Brief in Support Thereof.

J. ALTHEUS JOHNSON,
For Defendant in Error.

33007

In the Supreme Court of the United States.

October Term, 1903.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
JAMES L. CARSON,
Defendant in Error.

No. 546.

Motion to Dismiss or Affirm and Brief in Support Thereof.

Comes now here James L. Carson, the defendant in error, by Mr. J. Altheus Johnson, his attorney, and moves the court as follows:

1. To dismiss in this cause the writ of error to the Supreme Court of South Carolina:

A. Because no federal question was involved in the determination of the cause by the said court, or entered into the judgment of the court.

B. Because the judgment of that court in this cause is fully sustainable independently of any claim set up by the plaintiff in error under the Constitution or laws of the United States.

C. Because no question in this cause was decided adversely to any right claimed by the plaintiff in error under the Constitution or Laws of the United States.

2. To affirm in this cause the judgment of the Supreme Court of South Carolina, because, if any question exists in the case of which this court will take jurisdiction, it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

And, in support of the motion thus made, the defendant in error submits the accompanying brief.

J. ALTHEUS JOHNSON,
For Defendant in Error.

Take Notice, That on Monday, April 4, 1904, at twelve o'clock m., or as soon thereafter as counsel can be heard, the foregoing motion will be called to the attention of the Court.

J. ALTHEUS JOHNSON,
For Defendant in Error.

To Mr. William A. Henderson, Counsel for Plaintiff in Error:

Service of the foregoing notice, together with a copy of the motion and the accompanying brief, is hereby acknowledged, this 8th day of March, A. D. 1904.

W. A. HENDERSON,
Attorney for Plaintiff in Error.

33008

In the Supreme Court of the United States.

October Term, 1903.

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error.
vs.
JAMES L. CARSON,
Defendant in Error.

No. 546.

Brief in Behalf of Defendant in Error.

Statement of the Case.

James L. Carson, the defendant in error, a resident of Greenville County, South Carolina, for the loss of his right arm, brought suit for damages in the amount of $15,000 in the Common Pleas Court of South Carolina for Greenville County. At the time of his injury, August 16, 1902, he was a brakeman running from Spencer, N. C., to Greenville, S. C., on a freight train of the Southern Railway Company. At Converse, S. C., certain freight cars, or boxes, were to be cut off and left on a side track. Standing on the side track at the time were certain other freight cars, or boxes, belonging to the Southern Railway Company, which it was necessary, in the shifting of the cars, to couple together. The defendant in error was ordered by J. C. Arwood, the conductor of the freight train, to do the coupling. The defendant in error perfected the first coupling without difficulty, and, calling to the conductor to hold the train steady (the grade of the side track was rather steep), proceeded to make the second coupling. He discovered, however, when he attempted to make the second coupling, that the automatic coupler was out of order and that the coupling could be made only with his hands. He went between the cars for the purpose, but, before he

had time to effect the coupling, he heard the cars bumping together, and, to save himself, tried to get out from between the cars ; but his right arm was caught between the dead-blocks and crushed, and he was dragged some feet between the moving cars. He had not signalled for the train to back, and it was customary, according to testimony in the case, for the conductor, when a brakeman was making a coupling, to wait, before moving the cars, until the brakeman gave the signal.

The defendant in error, as stated above, brought suit in the Common Pleas Court of Greenville County, and he made the Southern Railway Company, J. C. Arwood, the conductor of the freight train, who had commanded him to do the coupling, and J. D. Miller, the engineer of the train, defendants to the suit. Arwood and Miller were both residents of Greenville County, S. C. The Southern Railway Company is a corporation chartered under the laws of the State of Virginia, engaged in running trains from State to State as a common carrier.

In his declaration Carson charged that his injuries "were due to the joint and concurrent negligence, carelessness and fault of the defendants, and to their joint and concurrent recklessness, carelessness, wilfulness and wanton disregard of the plaintiff's rights and safety, in the following manner, to wit," setting forth the circumstances of his cause of action (Rec. p. 2). The defendants answered separately, each answer, in identical terms, denying all negligence or liability on the part of the answering defendant for the tort complained of and asserting "that the plaintiff's alleged injury was the result of his own negligence." (Rec. pp. 4-5).

Trial was had and the jury found for the plaintiff against the Southern Railway Company $6,500 (Rec. p. 59). On this verdict judgment was entered, and, from the judgment so entered, the Southern Railway Company appealed to the Supreme Court of the State. That court affirmed the judgment, whereupon the Southern Railway Company

prayed for and was allowed a writ of error to bring the judgment of the State Supreme Court before this court for review.

The record in this case (pp. 62-75) shows 48 exceptions noted by the plaintiff in error. These exceptions began with the overruling of the demurrer which each of the three defendants had interposed to the declaration, and ended with the overruling of a motion made by the defendant railway company for judgment notwithstanding the verdict, the latter motion having followed the overruling of a motion in arrest of judgment made by the same defendant.

Some of these exceptions (about 12 in number) sought, in terms, to declare that a Federal question was involved in the case. The exceptions which are thus said by the plaintiff in error to rest upon Federal law center upon two points, namely :

1. The law which provides for the removal of a case from a State to a United States Court ; and

2. The law which provides that railroad companies engaged in interstate commerce shall equip their cars with automatic couplers.

(1). As to Removal of Case.

The defendant railway company did not at any time ask for a removal of the case into the Federal Court ; did not at any time suggest that the conductor of the train and the engineer (who were both citizens of South Carolina) were improperly joined as defendants, or that the plaintiff in joining them had no just hope or expectation of recovery against either or both of them. On the contrary, it admitted the law to be that it had no right of removal when the declaration charged a tort committed jointly by it and two citizens of the State ; but it set up the claim that, under such a declaration, it (the defendant railway company) could not alone be adjudged guilty. In other words,

because it would have the right, if sued alone, to remove the case into a Federal court, it claimed that a verdict in tort could not be rendered against it alone in a suit in which it and other persons had been jointly sued for the tort.

The plaintiff in error, in the assertion of the claim it set up in this regard, noted, among other exceptions, the ones which are numbered 30, 31, 34 and 35, number 30 being an exception taken to an instruction to the jury granted by the trial judge, and Nos. 31, 34 and 35 being exceptions taken to the refusal by the trial judge to grant certain instructions said, by the plaintiff in error, to contain a correct principle of law applicable to the case. The matter to which the said exceptions were taken is the following:

Exception No. 30 (Rec. pp. 69, 56):

"Notwithstanding plaintiff has alleged in his complaint joint and concurrent negligence on the part of all the defendants, I charge you that if the proof fails to show such joint and concurrent negligence on the part of all the defendants, yet shows negligence on the part of one or more of the defendants, which negligence resulted in injury to plaintiff as the sole and proximate cause thereof, then you may find a verdict against such defendant or defendants as the proof shows was guilty of such negligence."

Exception No. 31 (Rec. pp. 70, 58):

"The plaintiff having alleged a joint and concurrent tort of the defendants, the defendant, Southern Railway Company, a foreign corporation, has been deprived of the right, where the tort was not joint and concurrent, to remove this cause to the United States Court. To sustain this action the plaintiff must therefore prove that the acts complained of were the joint and concurrent negligence and tort of the railway company and at least one of the other defendants."

Exception No. 34 (Rec. pp. 70, 58):

"To allow the plaintiff, after alleging a joint and concurrent tort by a foreign corporation and its servant or ser-

vants, to recover damages without proof of such joint and concurrent tort would deprive such corporation of the right of removal to the United States Court, a right guaranteed by the Constitution and laws of the United States, and which would exist were the tort several and not joint and concurrent."

Exception No. 35 (Rec. pp. 71, 58):

"To allow the plaintiff, after alleging a joint and concurrent tort by a railway corporation and its servant or servants, to recover damages without proof of such joint and concurrent tort, but simply upon proof of a negligent act on the part of such servant or servants, would deprive the railway company of its property without due process of law, contrary to amendment XIV, Constitution of United States, for this reason: It would deprive said company of the right of reimbursement from the defaulting servant or servants, which would exist were the tort not joint and concurrent, but simply the wrong of the servant or servants for which the company may be liable."

The exceptions above mentioned (as also exceptions 12, 13, 14, 16 and 17, which presented the same question in connection with the motion for a non-suit) were all overruled. Indeed, as stated in the opinion of the court (Rec. pp. 94, 83), these exceptions were not even argued in the State court, that tribunal having as recently as March of last year decided the cases of Schumpert vs. Southern Railway Company (65 S. C., 332; 43 S. E. Rep., 813) and Gardner vs. Southern Railway Company (65 S. C,, 341; 43 S. E. Rep., 816,) which cases were regarded as concluding the above exceptions so far as the courts of South Carolina were concerned.

The right of a defendant to remove his case for trial from a State to a United States court depends upon the act of Congress, and this Court has repeatedly held that no such right has ever been conferred by Congress upon a defendant in a case like the one now before us.

Chesapeake & Ohio Railway Co. vs. Dixon, 179 U. S., 131.

Powers vs. Chesapeake & Ohio Ry. Co., 169 U. S., 92.

Louisville & Nashville R. R. Co. vs. Wangelin, 132 U. S. 599.

Pirie vs. Tvedt, 115 U. S., 41.

Louisville & Nashville R. R. Co. vs. Ide, 114 U. S. 52.

The case in 169 U. S., above mentioned, was an action brought against the railroad company and several of its servants to recover for an injury alleged to have been caused to the plaintiff by the negligence of all the defendants. From that case the court, in the case in 179 U. S., above mentioned, quoted approvingly as follows (179 U.S., p. 137):

"It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a State court against all jointly, contains no separate controversy which will authorize its removal by some of the defendants into the Circuit Court of the United States, even if they filed separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for, as this court has often said, 'A defendant has no right to say that an action shall be several which the plaintiff seeks to make joint. A separate defense may defeat a joint recovery, but it can not deprive a plaintiff of his right to prosecute his suit to final decision in his own way. The cause of action is the subject matter of the controversy, and that is, for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings.' "

Furthermore, the right of removal, in cases where it exists, must be exercised by the defendant before his plea or answer is due; otherwise, the right is waived and lost.

Kansas City R. R. vs. Daughtry, 138 U. S., 298.

Baltimore & Ohio R. R. Co. vs. Burns, 124 U. S., 165.

Besides, the removal of a case on the ground of diverse citizenship does not in the slightest degree change the law under and by which the case is to be decided. If a case arising under and determinable by the laws of a State should, by reason of diverse citizenship, be transferred to a court of the United States, the latter tribunal would administer the identical law which, but for the transfer, the State court would have administered.

Texas & Pac. Ry. Co. vs. Humble, 181 U. S., 51.

The vice underlying the exceptions now under consideration is plainly apparent. The act of Congress under which these exceptions are claimed merely prescribes the circumstances under which a case can be removed for trial from one court into another. The plaintiff in error is seeking to have the statute afford also a criterion or touchstone by which to judge of the litigation on its merits—a matter altogether foreign to the statute. All courts agree, both State and Federal, that a person against whom a tort has been committed, is at liberty to sue jointly all the supposed tort-feasors, and that a judgment, according to the proof produced, may be against one, or all, or some only, of the defendants ; but the plaintiff in error in this case now comes forward with a novel, not to say startling, proposition and hangs it upon the act of Congress which permits a case to be removed for trial from a State to a United States court, namely :—If a citizen of one State should be sued in the courts of another State with citizens of the latter State for a tort commttted, then the question whether a judgment can be rendered against only one defendant depends upon the question whether such defendant, if sued alone, could have removed the case into a court of the United States. The bare statement of such a proposition carries its own answer.

(2) As to the Couplers on its Cars.

The other matter on which the plaintiff in error in this case endeavored to predicate a Federal question is the act of Congress of March 2, 1893 (27 Stat. at L,. 531) entitled, "An act to promote the safety of employes and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes," the second section of which act reads as follows: "That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or to permit to be hauled on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

At this point, in connection with the above act of Congress, it is proper to quote the following from the Constitution of South Carolina (1895), Art. IX, Sec. 15, particular attention being called to the passages here printed in italics:

"Every employe of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporations or its employes, as are allowed by law to other persons not employes, *when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured*, and also when the injury results from the negligence of a fellow servant engaged in another department of labor from that of the party injured, or of a fellow servant on another train of cars, or one engaged about a different piece of work. *Knowledge by any employe injured of the defective or unsafe character or condition of any machinery, ways or appliances shall be no defense to an action for injury caused thereby*, except as to conductors or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. . . Any contract or agreement, expressed or im-

plied, made by any employe to waive the benefit of this section shall be null and void. . The General Assembly may extend the remedies herein provided for to any other class of employes."

Under the law of the State, as announced by the trial judge independently of the act of Congress, the jury was charged as follows, the plaintiff in error, as to the charges thus made, taking the exceptions which are numbered 23, 24, 25 and 26, respectively, the words of the charge only being here quoted, namely:

Exception No. 23 (Rec. pp. 67, 56):

"I charge you that it was the duty of the railway company in this case to furnish the plaintiff with safe and suitable appliances with which to perform the work required of him, and also see that the same were kept in proper repair, and if this duty was negligently performed, and the plaintiff sustained any injury thereby, the railway company is responsible in damages, provided the negligence of the railway company was the direct and proximate cause of the injury, and that the plaintiff did not contribute to the direct and proximate cause of the injury."

Exception No. 24 (Rec. pp. 67, 56):

"I charge you that the risk which a railway employe assumes when he enters the employ of a railway company does not extend to such risks as he is exposed to by reason of defective machinery or appliances."

Exception No. 25 (Rec., pp. 67, 56):

"I charge you that contributory negligence on the part of the servant by using appliances obviously defective, furnished by a railway company, is no longer of force in South Carolina under the Constitution of 1895."

Exception No. 26 (Rec., pp. 67, 56):

"The fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed

to do the work required of him, and he is, therefore, not bound in such a case to search for danger. He may rely for his safety upon the conduct of the conductor."

These several exceptions were by the Supreme Court of the State overruled, as may be seen in the opinion of the court at page 95 of the record.

Before adverting to that part of the charge which touched the Act of Congress above mentioned, it will be proper to look to another part of the charge (also made under the law of the State, independently of the Act of Congress), the plaintiff in error, as to the charges now to be mentioned, having taken the exceptions which are numbered 27, 28 and 29, respectively. These charges were given in the light of testimony which showed that Arwood, the conductor of the train, had ordered the defendant in error to couple the cars on the side track (Rec. p. 6); that the cars of the defendant railway company (furnished with the Janney coupler) could not be coupled, if the knuckles of the coupler were closed, as they often were, without going between the cars (Rec. pp. 7, 26, 28, 29, 32, 36, 37), and that it was also necessary to go between the cars when the air-brakes needed to be adjusted (Rec. pp. 23, 29, 32, 40); that it was usual for the brakemen of the defendant railway company in making couplings to go between the cars; that the conductor in such cases always awaited a signal from the brakeman before ordering the cars to move (Rec., pp. 8, 24, 26, 29, 37); that the defendant in error, before attempting the coupling in which he was injured, had pointedly told the conductor to hold the train steady (Rec. pp. 7, 8, 11); that the cars, without a signal from the defendant in error and while defendant in error was still between them, were moved on an order from the conductor (Rec. pp. 8, 12, 25, 27, 38, 47, 48). The defense had also put in evidence certain rules of the defendant railway company enjoining brakemen, among other things, from going between cars to couple or uncouple them, or to set pins or links, and requiring brakemen to use

sticks in coupling and uncoupling cars, etc. (Rec. pp. 12, 13). It also appeared in evidence that no pin or stick had been furnished to the defendant in error, and that such had regard to a different method of coupling than was in use August 16, 1902, the time the defendant in error met with his injury (Rec., pp. 8, 29, 32, 36).

The trial court, as stated above, charged as follows under the law of the State, the words of the charge only being here quoted with the number of the exception thereto as taken by the plaintiff in error, namely:

Exception No. 27 (Rec., pp. 68, 56);

I charge you that a rule forbidding railway employes going between railway cars in motion for the purpose of coupling or uncoupling them, or when attached to an engine, within itself is a reasonable requirement, but such rule must be taken with the qualification that the company will provide other means for performing the necessary service, and, if it fails to do this, the rule is no protection to the company against liability for damages for injury sustained in doing the work required to be done and in the performance of which said rule is violated."

Exception No. 28 (Rec., pp. 68, 56);

"I charge you that the rule of the railway company with reference to coupling or uncoupling cars with a pin and stick while the cars are attached to an engine, or in motion, has no application to a case where the master fails to furnish to the servant a pin and stick sufficient to effect the said coupling."

Exception No. 29 (Rec., pp. 69, 56);

"If the jury find that the rule forbidding the going between the cars in motion or when attached to an engine, and forbidding the setting of pins and links, except with a stick, was adopted by defendant railway company when a method of coupling cars prevailed by the use of a pin and link; and if the jury find that the said method of coupling cars has been superseded by a method whereby no pin need be set or pins and links need be used, then it is for the

jury to say whether or not said rule was at the time of the injury complained of in force and whether or not plaintiff was then bound by the same."

These several exceptions were also overruled by the Su-Court of the State, as seen in the opinion of Chief Justice Pope (Rec. p. 95).

It is also under the law of the State, as distinguished from Federal law, that the following charge was made, being part of what is embraced in the exception noted as No. 22 by the plaintiff in error (Rec., pp. 66, 56;)

"The rule of the defendant railway company forbidding employes going between cars for the purpose of coupling or uncoupling them may be waived by it. I charge you that the conductor is the representative of the railway company, and if said company fails to furnish appliances to brakemen, by means of which they may effect said coupling without going between the cars, or furnish them appliances which make it necessary for them to go between the cars to perform the work required of them and without objection, then it is for you to say whether or not such conduct on the part of the railway company amounts to a waiver of the said rule, and if you do find that it amounts to a waiver, then I charge you that in such a case the railway company cannot invoke the said rule in its behalf."

The trial judge also said to the jury (Rec. pp. 55-6):

"I charge you, as a matter of law, that if the plaintiff in any way contributed to the direct and proximate cause of the injury, your verdict should be for the defendants. The law does not allow a man to come into court and recover if he by his own act contributes to the cause of the injury."

And again as follows (Rec., p. 58):

XII. "If the plaintiff in any of the circumstances attending the injury was guilty of negligence which caused the injury, he is not entitled to any damage."

XIII. "Even if the defendants or any of them were guilty of negligence under the circumstances attending the injury, still the plaintiff cannot recover damages if he himself was guilty on account of carelessness which contributed to the proximate cause of the injury.

XIV. "Contributory negligence to any extent will always defeat a recovery, provided it is of the same character as that of the defendant is required to be, namely, a proximate cause of the injury."

XV. "There is no difference in law between the character or quality of the negligence of defendant which will fix a liability upon it, and that of the plaintiff, which will charge him with contributory negligence."

The act of Congress of 1893 above mentioned concerning car-coupling, was adverted to by the trial Court in the following words (Rec., pp. 56, 65), these remarks being the subject of exceptions by the plaintiff in error, numbered 21 and 22 respectively, namely :—

Exception No. 22 (Rec., p. 65, 56) :—

"By act of Congress it is provided that, 'on and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce to haul or to permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' I charge that if you believe the defendant railway company was a common carrier engaged in interstate commerce, and was using for the purpose of moving interstate traffic the cars mentioned in the complaint as causing plaintiff's injury, and that said cars were not equipped with couplers coupling automatically by impact, so as to obviate the necessity of plaintiff going between them to effect the coupling, such failure to provide such automatic couplers was negligence on the part of the railway company, which negligence continued up to the very moment of the collision, if you believe there was such a collision and injury in consequence thereof ; and if you believe that such negligence was the proximate cause of such injury, your verdict should be for the plaintiff."

Exception No. 21 (Rec., pp. 65, 56), so much only of the judge's words being here quoted as entered into the exception :—

"The law requires them (railroads) to keep suitable appliances for running such trains, and to keep them in good condition. I charge you that any railroad engaged in running trains from State to State is required, under the law, to have automatic coupling ; and I charge you further that they (the railroads) are required to keep these appliances in good order ; that is, in safe and suitable order."

In overruling these exceptions (noted under the act of Congress) the Supreme Court of the State, through its Chief Justice (Rec., pp. 94–5), declared that no error had been committed by the trial judge in stating the rule established by the act of Congress, and declared also that the rule stated by the trial judge was the law of South Carolina, independently of the act of Congress. To quote from the opinion as to these exceptions Nos. 21 and 22 (Rec. pp. 94–5):—

"The cases in this State," citing four of them, "all hold that it is the duty of the master to furnish safe machinery and appliances to its servants and also to keep such machinery and appliances in good order. The master is not made a guarantor strictly ; but it is his duty to furnish safe machinery and appliances and to preserve it in good order and repair. The Circuit Judge correctly stated the rule in this State. The act of Congress in relation to couplings to cars engaged in interstate commerce peremptorily demands that carriers of interstate commerce shall use automatic couplings on the cars used by them. This defendant was a carrier of freight of interstate commerce, and of course was bound by the act of Congress, no matter what rules it may have adopted for the government of its servants. The Circuit Judge properly stated the rule. It is well known that Congress took control of these matters for wise purposes, among which was the protection of railroad employes. It would be a want of wisdom and a disregard of law for this act of Congress to be emasculated. Of course, Congress intended, when it directed these automatic couplers to be used, that they should not only be provided and attached to cars, but that such appliances should be kept in proper repair for constant use. *It is the law of this State, even if the act of*

Congress in question had overlooked this duty of keeping such appliances in good order, which includes proper repair."

This Court has often declared the conditions under which a writ of error will lie to bring before it for review the judgment of a State court.

Beals vs. Cone, 188 U. S., 184.
Allen vs. Southern Pacific R. R. Co., 173 U. S., 479.
McQuade vs. Trenton, 172 U. S., 636.
Chappell Chemical Co. vs. Sulphur Mines Co. 172 U. S., 465.
Capital Bank vs. Cadiz Bank, 172 U. S. 425.
Harrison vs. Morton, 171 U. S. 38.
Chemical Bank vs. City Bank of Portage, 160 U. S., 646.
DeSaussure vs. Gaillard, 127 U. S., 216.

As stated in the case above mentioned in 171 U. S., at page 47 :

"It is settled law that, to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment."

It is apparent that the case at bar, under the testimony and the instructions to the jury of the trial court, does not

in anywise depend upon, or involve, the automatic car-coupler act of Congress.

If that act were involved in the case, the record shows that it was involved only with a view to administering it, and not with a view to questioning in any respect its validity or binding efficacy. This court, in construing Section 709 of the Revised Statutes of the United States (the law which confers upon this court the jurisdiction it has over the judgments of State courts), has repeatedly declared that the mere construction by a State court of an act of Congress, however erroneous the constrution may be, does not of itself present a Federal question within the jurisdiction of this court. It is necessary that the plaintiff in error, or person complaining of the judgment of the State court, should have set up, or claimed, in the State court, some "title, right, privilege or immunity," based upon, or derived from, Federal law or Federal authority, and the judgment of the State court must have been adverse to his claim. As said in the leading case of Murdock vs. City of Memphis (20 Wall., 590, 636), a case which so exhaustively considered the law (Sec. 709 R. S. U. S.) as to make subsequent cases but little more than an application of the principles announced inthat case;—

"The decision (of the State court) must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, law or authority of the United States."

In the case at bar, the plaintiff in error claimed nothing whatever under the act of Congress of March 2, 1893, except that *error was committed in the judicial construction* given to the act by the State court. No "title, right, privilege or immunity" based upon that law or derived therefrom, was claimed by the plaintiff in error and refused by the State court. The Federal law had not said that a railway company engaged in interstate commerce *should not be required* to keep its automatic couplers "in good

order, that is, in safe and suitable order," "so as to obviate the necessity of plaintiff going between them (the cars) to effect the coupling" and the State court, disregardful of an exemption or immunity so granted declare that the automatic couplers *must be kept* "in good order, that is, in safe and suitable order," "so as to obviate the necessity of plaintiff going between them (the cars) to effect the coupling." The State court charged the law in the exact language of the Federal statute and then added, supplementary of the statute, a construction which imposed upon the carrier the duty required of it by the State law, asserting at the same time that the same duty was incumbent upon it under the Statute of the United States. The Supreme Court of the State declared the law of the State to be that a railway company shall keep its automatic couplers "in proper repair for constant use" (Rec., p. 95). The gravamen of the error assigned against the construction of the statute as made by the State court is (Rec p. 66);—

"The charge of the judge stamped it as negligence if the plaintiff, in order to make a coupling or to adjust the knuckles, had to go between the ends of the cars."

Does this present a Federal question of which this court will take jurisdiction?

The case of Hannibal and St. Joseph Railroad Co. vs. Missouri River Packet Co. (125 U. S., 260) is a case in which the Packet Company had sued the Railroad Company in a State court for the injury which two of its steamboats had sustained in striking the piers while passing through the draw of a bridge which Congress had authorized the Railroad Company to build across the Missouri River at Kansas City. The act of Congress required that the distance between the piers of the bridge should be 160 feet. The bridge was not built at right angles with the current of the stream, but obliquely at such an angle that a span of 160 feet, measured along the line of the structure, afforded but 153 feet and a fraction in the clear, measured with reference

to the current of the stream. The State court held the bridge to be not a lawful structure under the act of Congress, and a verdict and judgment went against the Railroad Co. for $5,300.00. The Supreme Court of the States affirmed the judgment. The attitude and judgment of the State court toward the bridge, as viewed under the act of Congress which had authorized its construction. is shown in the following words of this court (125 U. S., 268);—

"The Supreme Court of the State of Missouri, in affirming the judgment of the Circuit Court of Jackson county, ruled clearly that the distance of 160 feet between piers of the bridge required by the act of Congress should be obtained by measuring along a line between said piers drawn perpendicular to the faces of the piers and the current of the river : and that, as such line would measure but 153 feet and a fraction instead 160 feet as required, the bridge was not a lawful structure within the meaning of the act."

This court agreed with the State court in the view that the bridge was not built in conformity with the act of Congress, and in that respect declared that no error had been committed by the State court. But the State court had given following instruction (122 U. S., 275) :—

"The jury are instructed that unless the bridge mentioned in the answer had piers which were parallel with the current of the river, and spans of not less than 160 feet in the clear on each side of the pivot pier, then said bridge is an illegal structure and an unlawful obstruction to the navigation of the Missouri river ; and if the jury further believe from the evidence that it was not such a bridge, and further believe that the plaintiff's boats, Alice and St. Luke, or either of them, while attempting to pass through the draw of the bridge in charge of pilots exercising usual and ordinary care, struck the draw-rest of the bridge, and were damaged thereby, then the jury will find their verdict for the plaintiff as to such boat or boats."

Was not that instruction just of the kind as the ones of which the plaintiff in error is complaining in the case at

bar under his exceptions Nos. 21 and 22? And yet this court said of that instruction (125 U. S., 272);—

"It is said that by sustaining this instruction the Supreme Court of Missouri held that the mere fact that the bridge had not been constructed as required by the statute rendered the Railroad Co. liable, *irrespective of the question whether the improper construction caused the accident;* and it is urged that such holding is erroneous.

"This, however, does not present any Federal question for the consideration of this court, and therefore we decline to examine into its merits."

In Jersey City and Bergen R. R. Co. vs. Morgan (160 U. S., 288), a ten cent silver piece, worn "smooth," had been refused as fare by the conductor of a street car. The ejected passenger brought action in the State court against the street car company. The defence was made under the general issue and a special plea of *molliter manus imposuit.* The coin was exhibited in evidence to the jury and much was said about its condition. The defendant, at the close of the evidence, had asked the court to direct a verdict in its favor on the ground that the worn coin was not a legal tender under the laws of the United States; but the trial court gave instructions to cover the case and left it for the jury to say whether the plaintiff, in offering the coin, had lawfully tendered his fare. The verdict and judgment of the trial court were against the defendant company. The Supreme Court of the State sustained the instructions granted by the trial court and affirmed the judgment, saying in its opinion (as quoted from in this court, 160 U. S., 292);—

"It seems by these statutes (of the United States) that so long as a genuine silver coin is worn only by abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value."

This court said (160 U. S., 292);—

"The claim which defendant now states it relied on, is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the State courts so adjudged, the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it."

This court said further (p. 293) ;—

"Although denying plaintiff's claim, defendant did not pretend to set up any right it had under any statute of the United States in reference to the effect of a reduction in weight of silver coin by natural abrasion," giving this as an additional reason for declaring itself to be without jurisdiction to entertain the case.

Indeed, this court, since the decision in Murdock vs. the City of Memphis, above cited, has persistently refused, on a writ of error to a State court, to consider any question not Federal in character, or to consider a Federal question even, unless "the title, right, privilege, or immunity," constituting the Federal question, were specially set up and claimed in the State court.

Myrick vs. Thompson, 99 U. S., 291, 297.
Bonaparte vs. Tax Court, 104 U. S., 592, 595.
Sayward vs. Denny, 158 U. S., 180, 183.
Oxley Stave Co. vs. Butler Co., 166 U. S., 648.

And it is not enough that the plaintiff in error set up and claim a Federal question. The question, to give to this Court jurisdiction, must be a real and not a fictitious one —a real substantial question, on which the case may be made to turn. As said by this Court in New Orleans Waterworks Company vs. Lousiana (185 U. S., 336);—

"There must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that

its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up."

This court has also, with persistent uniformity, declined to review the judgment of a State court, upon a Federal question of even the most meritorious character, if the judgment of the State court is sustainable on other than Federal ground.

Jenkins vs. Loewenthal, 110 U. S., 222.
Adams County vs. Burlington and Mo. R. R. Co., 112 U. S., 123.
Hale vs. Akers, 132 U. S., 554.

It is interesting, as we pass, to note, in this connection, the careful regard which this tribunal, in the discharge of its high duty under the Federal Constitution, has always manifested for the rights of the State when acting within the sphere which belongs to the State. Ever ready to assert and maintain its own high jurisdiction as the expounder of Federal law, it has at the same time (and the fact challenges admiration) been scrupulous to recognize and preserve the independent jurisdiction of the State. Often called upon to decide questions determinable by the laws of the several States, this august tribunal has never hesitated to accord to the highest court of a State the exposition of the laws of the State, never itself assuming to occupy hostilely ground which belongs to a State. An instance or two will illustrate.

This court, in 1881, in a case which came up from the United States Circuit Court for the district of Nebraska, had occasion to construe the will of a citizen of Nebraska, who, dying in 1869, had left his lands, now constituting a part of the City of Lincoln, to his wife, so long as she remained his widow, with the right to dispose of the same, and to his children if she should remarry

(the phaseology of the will is not here given, only its general character indicated). The widow in March, 1870, sold part of the land (a number of lots) and in December, 1879, remarried. The question before this court in 1881 was whether the estate received by the widow's grantee had determined on the widow's remarriage. This court (as seen in Giles vs. Little, 104 U. S., 291) held that the grantee's estate had determined, holding that the will had conferred upon the widow only an estate during widowhood, and that the remainder in fee had passed to the children of the testator upon the remarriage of the widow.

Later, the same will, in connection with other of the lots which had been sold by the widow, came for construction before the Supreme Court of Nebraska, and that court (as seen in Little vs. Giles, 25 Neb., 313) held that the grantees under the deeds from the widow had acquired all the title the testator possessed to the lands.

Still later, the will came again into the courts of the United States, in connection with lots which the widow had conveyed, and we see this court, because the question was one of local law under a statute of the State, overruling its decision in 104 U. S., and (as reported in Roberts vs. Lewis, 153 U. S., 367) directing the United States Circuit Court of Appeals to follow the decision of the Nebraska State court, as reported in 25 Nebraska, 313.

Again, this court in 1879, in a case from the District of Columbia, had occasion to construe the act of Congress which fixed the rate of interest in the District at six per cent. per annum, with permission to the parties, by special agreement, to fix their own rate not to exceed ten per cent. per annum. The question before the court was what rate prevailed after maturity of the obligation when the special contract was silent on that point. This court held (Holden vs. Trust Company, 100 U. S., 72) that the special rate ran until the maturity of the debt, and that after maturity the debt drew interest at the legal rate of six per cent per annum. The State of Illinois had a statute on the subject of interest

precisely similar to the act of Congress for the District of Columbia, and this court, in 1881, in a case which came up from the United States Circuit Court for the Northern District of Illinois, held under the Illinois statute that the contract rate continued, not only to the maturity of the debt, but until the debt was paid, departing from its construction of a similar statute for the District of Columbia, because, as said by the court, "a different rule has been established in Illinois by the decision of the Supreme Court of that State" (Ohio vs. Frank, 103 U. S., 697). As had been said by this court previously, concerning interest in a case which had come up from Iowa, "The question is one of local law under a statute of a State, and the construction given by its tribunals should conclude us" (Cromwell vs. the County of Sac, 96 U. S., 51, 62).

One other instance;—This court, in 1884, after an elaborate consideration of the subject and a review of cases, both English and American, adopted the rule that a common carrier, by a special contract, could limit its liability, even for injuries resulting from its own negligence (Hart vs. Pa. R. R. Co., 112 U. S., 331). A different rule had theretofore prevailed in Pennsylvania, but the Common Pleas Court for Pittsburg sought to follow the decision of this court. The Supreme Court of the State, however, in reversing the Pittsburg Common Pleas Court, declined to follow the rule announced in the Hart case, *supra*, saying (Grogan vs. Adams Express Co., 114 Pa. St., 523, 530);—"Our own decisions for a long time have established the opposite doctrine, until it has become firmly fixed in our system of jurisprudence. We could not depart from it now without overruling them all, and we are not willing to do so. The authorities upon the general subject are very numerous and conflicting. But with us the rule has been uniform and we prefer to adhere to it." To this declaration of the law in Pennsylvania, as made by the Supreme Court of the State, this court has had occasion to speak quite recently-

indeed, during the present term of the court. A race horse had been shipped from Albany, N. Y., to Philadelphia, Pa., on a contract which declared the liability of the carrier to be limited to $100. Such contracts are upheld in New York where the rule obtains which is announced in the Hart case, *supra*. The car in which the horse was shipped was run into while standing on the track at Philadelphia by a heavily loaded train and the horse injured. Suit was brought against the railroad company in the Common Pleas Court for Philadelphia and at the trial the court permitted evidence to be given of the value of the horse and the actual damage sustained. Verdict and judgment went against the railroad company for $10,000 and the judgment was affirmed by the Supreme Court of the State. The railroad company brought the judgment into this court on a writ of error, but this court said (Pa. R. R. Co. vs. Hughes, 191 U. S., 477, 486) ;—

"The highest court of Pennsylvania may administer the common law according to its understanding and interpretation of it, being only amenable to review in the Federal Supreme Court where some right, title, immunity or privilege, *the creation of the Federal power*, has been asserted and denied."

Two of the assignments of error which had been made in the above case were to the refusal of the trial court of the State to charge the jury as follows ;—

1. "That said contract must be interpreted and enforced here (in Pennsylvania) by the law of the place where it was made (New York) , within which State it was partly performed."

2. That the plaintiff is not entitled to recover in excess of $100."

But this court said (191 U. S., 485) ;—

"Neither of these assignments of error presents a Federal question in such sense as to give this court juris-

diction to review the judgment of the State court under section 709 of the Revised Statutes of the United States. Nothing is better settled in Federal jurisprudence than that the jurisdiction of this court in such cases depends upon the assertion of a right, title, privilege or immunity under the Federal Constitution or laws set up and denied in the State courts."

When the State court, in the case at bar, charged under the act of Congress, it charged in the words of the statute, adding that the automatic coupling required by the statute must be kept "in good order, that is, in safe and suitable order" (Rec. page 65). What right, privilege or immunity, existing by reason of Federal law, did the plaintiff in error invoke against that charge? What right, privilege or immunity, possessed by the plaintiff in error under Federal law, was violated or disregarded by that charge?

It will be remembered that the plaintiff in the present case (the defendant in error in this court) is not asserting a right which depends for its existence upon the construction to be given to an act of Congress. The act of Congress is not a thing crucial or vital to the cause of action he sets up; it comes in only incidentally, with other things, according as it might affect the question of negligence. Indeed, whether the act of Congress was applicable to the case at all, that is, whether the cars between which on the side track the defendant in error was injured were used in moving interstate traffic, was a fact which the trial court left to the jury for determination; and, if the jury had found the fact to be that those cars were used in such traffic, then, whether the couplers or coupling appliances on those cars were defective or not, was a fact which the trial court likewise left to the jury for determination. And this Court, upon a writ of error to a State court, will not review the judgment of the State court upon a question of fact, even though a Federal question would or would not be presented according to the way in which the question of fact

was decided (Dower vs. Richards, 151 U. S., 658, 663–672 ; Egan vs. Hart, 165 U. S., 188, 189.

The reference made by the trial court to the car-coupling act of Congress did not infringe upon or violate any right, privilege or immunity of the defendant Railway Company existing under or created by any act of Congress or law of the United States. The Supreme Court of South Carolina which passed upon the case, found no error of law committed by the trial court prejudicial to the plaintiff in error ; and the record of the case does not afford any Federal question for the determination of this Court.

The case from first to last rests upon the law of the State of South Carolina. No law of the United States supervened at any point to affect the result. The judgment is wholly sustainable independently of any law of the United States under which the plaintiff in error sought to set up the claim of a right.

The defendant in error respectfully submits that this court should not longer retain the case upon its docket.

J. Altheus Johnson,

Defendant in Error.